In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1495

THOMAS A. KLEPPE, Secretary of the Interior, ET AL.,
Appellants,

VERSUS

WANDA JUNE WEEKS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION TO DISMISS OR AFFIRM

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Appellees, Wanda June Weeks, Dorothy Frazier and Ruth Rattler, individually and on behalf of the Kansas Delaware class, move the Court, pursuant to Rule 16 of the Rules of this Court, to dismiss the appeal docketed herein by Thomas A. Kleppe, Secretary of the Interior of the United States, for the reason, as is more fully set forth herein, that the questions upon which the decision of this cause depend are so insubstantial as not to need further argument and for the further reason that the Jurisdictional Statement by which the appeal of Thomas A. Kleppe is lodged proceeds upon factual premises which are not supported by the record, but, in fact, are negated by the record.

In the alternative, these Appellees move to summarily affirm the judgment of the District Court on the merits, insofar as the same grants relief to these Appellees, for the reason that said Judgment, the Memorandum Opinion filed therewith, and the factual bases therefor rest upon such firm, legally and factually correct, and closely circumscribed grounds as not to present the perils asserted by said Appellant in his Jurisdictional Statement, and, therefore, present no occasion for plenary review.

ARGUMENT

The Kansas Delaware class, represented in this action by Wanda June Weeks, Dorothy Frazier and Ruth Rattler, Appellees, respond to the Jurisdictional Statement of the Secretary of the Interior as follows:

Question Presented

(As stated by the Appellant, Thomas A. Kleppe)

"WHETHER 25 U.S.C. (Supp. IV) 1291-1297, WHICH AUTHORIZES THE PAYMENT OF FUNDS TO MEMBERS OF TWO FEDERALLY-RECOGNIZED TRIBES OF DELAWARE INDIANS PURSUANT TO A JUDGMENT OF THE INDIAN CLAIMS COMMISSION, DENIES DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT BY EXCLUDING DESCENDANTS OF DELAWARE INDIANS WHO VOLUNTARILY SEVERED THEIR RELATIONS FROM THE TRIBE MORE THAN A CENTURY AGO."

This statement by the Appellant of the Question Presented contains a misstatement of the provisions of 25 U.S.C. §§1291-1297.

The statute provides for payments to individuals on a per capita basis whose names were on, or the name of an ancestor was on (or in the case of the Absentee Delawares, was *eligible* to be on) two rolls, neither of which were tribal rolls at the time they were prepared and certainly are not tribal rolls today. Further, in the case of the Absentee Delawares, the "eligible to be on" provision was inserted for the reason that tribal membership is limited to Indians of 1/8th Delaware Indian blood or more and the distribution was to be made to *non-tribal Indians* who have less than 1/8th Delaware blood. As stated by the District Court:

> "In actuality, modern tribal membership of one of the benefited groups, the Absentee Delawares, is not followed in the statutory distribution under 25 USCA §1292 (c)(2). *E.g.*, a person born after July 30, 1957, must have 1/8 Delaware blood in order to be recognized as a member of the Absentee Delaware Tribe. See Defendant Absentee Delawares' Ex. 9 and 28. However, for distribution under §1292(c)(2) such person need only show that his lineal ancestor's name is on or eligible to be on the constructed base census roll of the Absentees as of 1940, in which case he may thus participate in the distribution though he has less than 1/8 Delaware blood" (J.S. App. 48(a), n. 40).

The 1906 per capita payroll (25 U.S.C. §1292(c)(1)) was a roll of those emigrant Delawares who lived in the Cherokee Nation, compiled only for the purpose of distributing monies to that band of the Cherokee Nation (J.S. App. 13a, 14a, n. 15). These facts are clear from the record and refute any allegation that the rolls designated in the statute are tribal rolls.

Further, the "Delaware Tribe of Indians" was not a federally recognized tribe. The statute itself recognizes this and provides for no use of funds until a legal entity is formed. See 25 U.S.C. §1294. The organization that calls itself the "Delaware Tribe of Indians" was granted *limited* federal recognition only *after* the instant suit was filed (J.S. App. 18a, 19a, n. 20; compare 25 U.S.C. §1294(b) (proviso) with 25 U.S.C. §§477, 503).[1]

The Question Presented refers to the Kansas Delaware class as "descendants of Delaware Indians who voluntarily severed their relations from the tribe more than a century ago." This is both a misleading and an unfair characterization of their status.

The adult Kansas Delawares who are ancestors of the present members of the excluded class severed their relations with the tribe on the *express condition* that they would receive their pro-rata share of the very fund which is made whole by the funds appropriated to pay the Indian Claims Commission judgment and which are the subject of the challenged statute (Article 9, Treaty of 1866, J.S. App. 113a).

Further, the members of the present Kansas Delaware class are also descendants of Kansas Delawares who were minors when their parents resigned from the tribe, and such minors never severed their relations with the tribe (J.S. App. 11a, 12a).

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[1] "J.S.App." references are to the Appendix to the Jurisdictional Statement of the Appellants Townsend, et al., members of the Cherokee Delaware class, for the reason that the Jurisdictional Statement of the Appellant Thomas A. Kleppe likewise refers to said Appendix.

The footnote on page 4 of the Secretary of the Interior's Jurisdictional Statement which states that "[a] total of 21 adults and 49 minors chose to remain in Kansas . . ." is inaccurate. The minors who are the ancestors of the present Kansas Delawares did not *choose* to remain in Kansas. The Treaty of 1866, Article 9, provided that they were *required* to remain with their parents in Kansas, but that they each had the option of remaining in Kansas or joining the tribe when they reached majority. The next year, the tribe entered into an agreement with the Cherokee Nation under the terms of which the Delaware Tribe of Indians was dissolved and abandoned and each Delaware Indian became a member of the Cherokee Nation. *Cherokee Nation* v. *Journeycake*, 155 U.S. 196, 5 S.Ct. 55, 39 L.Ed. 120 (1894). The Kansas Delaware minors were ineligible to become members of the Cherokee Nation under this agreement and they, thus, had no option upon reaching majority of severing their relation with the tribe (J.S. App. 12a, Text at n. 13) because the tribe no longer existed as a political body. The Cherokee Delawares became a band of the Cherokee Nation, and maintained *group* identity, having tribal chiefs and business committees until the present time (J.S. App. 11a, note 12). However, this group was not a "tribe" and the minor Kansas Delawares were not members of the group and could not sever their relation with the "tribe" since none existed. The Kansas Delawares are, thus, descendants of non-expatriated members of the historical tribe.

The District Court found that the three classes of claimants had equal standing in their claims to share in the subject fund (J.S. App. 50a). The only issues involved

are whether the District Court was correct in its finding that there was "equal standing" and whether, assuming that there was equal standing, there was a supporting rationale for the exclusion of the Kansas Delaware class.

The finding by the District Court that the claim of the Kansas Delaware class to a right to share in the fund was on equal standing with the other two classes does not present a constitutional question for this Court. This finding of equal standing, based upon the historical record, was a factual determination amply supported by the historical events and the evidence before the District Court. Indeed, it was the only rational conclusion which could have been reached by the District Court.

Substantiality of Question

In his discussion of the substantiality, the Secretary states that the Question Presented presents the important question of the "scope of Congressional power over Indian affairs." No such question is raised by the Question Presented. Stripped of the surplus and misleading language, the Question Presented reads as follows: "Whether 25 U.S.C. (Supp. IV) 1291-1297 denies due process of law under the Fifth Amendment by excluding the [Kansas Delaware] Indians." The "scope of Congressional power" is not involved in this Statement, as framed by the Secretary, unless the Secretary means to imply that Congress has the power to deny due process of law to fully emancipated non-ward Indians, an implication which would be summarily rejected by the Court if stated expressly.

The other question which the Secretary states is presented concerns "the proper application of the Due Process clause to legislation affecting distribution of tribal funds." The funds involved are not "tribal funds," but are Congressionally appropriated (83 Stat. 447, 453) public funds designated, subsequent to appropriation, for distribution to *individuals* without regard to tribal membership, to pay an Indian Claims Commission judgment to present representatives of the historical tribal entity that was wronged, which historical tribal entity was thereafter dissolved.

The case of *Morton* v. *Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), cited and relied upon by the Secretary, involves the power of Congress to favor Indians by singling out for special treatment a "constituency of tribal Indians living on or near reservations." 417 U.S. at 552, 94 S.Ct. at 2483, 41 L.Ed.2d at 302. "Indians," within the meaning of the Act involved in *Mancari*, are defined by 25 U.S.C. §479 to be "all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation and shall further include all persons of one-half or more Indian blood." The special relationship between the government and Indians who are "on or near" reservations provided a unique legal status which was the basis for affirming the power of Congress to confer special employment favors.

This Court said that the exemptions reveal a clear Congressional sentiment that an Indian preference *in the narrow context of tribal or reservation-related* employment

did not constitute racial discrimination. It was recognized by this Court that Indians, as defined in the Act, constituted a unique class. This Court said:

> "Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes. . . ." 417 U.S. at 551, 94 S.Ct. at 2483, 41 L.Ed.2d at 301.

> "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." 417 U.S. at 554, 94 S.Ct. at 2484, 41 L.Ed.2d at 302.

Here, the "favored classes" are not ward Indians, and are not on or near reservations; they are fully assimilated Indians whose only interest in the appropriated funds is their ancestral ties to the members of the tribe at the time it was wronged (ties which are identical with those of the Kansas Delaware class). The *Mancari* case, *supra*, affords no basis for the invidious discrimination between the classes of such persons.

Given the fact that these funds were specifically directed to be distributed to *individual Indians* (25 U.S.C. §1292) *regardless of tribal membership* (J.S. App. 13a, n. 15; 48a, n. 40), all of whom are emancipated United States citizens (48 Stat. 253), the only holding which would be sufficient to overturn the judgment of the District Court would be a holding that where a distribution of benefits is Indian-related, and the statutorily designated recipients

(as well as those who challenge the distribution scheme) have Indian blood, the Indian connection and the Indian blood of the recipients and the challengers, without more, are sufficient to close the doors of the federal courts and bar redress sought on constitutional grounds. Such a holding would fly in the face of over 100 years of constitutional precedent delineating the arena within which the dominating force of the plenary power operates and tying its exercise to matters of reservated ward Indians,[2] crimes in Indian country,[3] tribal lands,[4] tribal recognition,[5] tribal membership[6] or tribal welfare.[7] Without these boundaries, the "plenary power of Congress in Indian affairs" would be tied only to race and would become all-pervasive, creating a permanently blighted sub-class of sub-citizens.

Sizemore v. *Brady*, 235 U.S. 441, 35 S.Ct. 135, 59 L.Ed. 308 (1914), cited in support of the position of the Secretary, upheld a statute providing for devolution of tribal lands held in trust for the tribe to tribal members. It was asserted that the Due Process clause of the Fifth Amendment to the Constitution limited the power of Congress to provide for a distribution which was different than that provided in a prior statute. The power of Congress to change the devo-

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[2] *Elk* v. *Wilkins*, 112 U.S. 94, 99-100, 5 S.Ct. 41, 28 L.Ed. 643 (1884).

[3] *United States* v. *Ramsey*, 271 U.S. 467, 46 S.Ct. 559, 70 L.Ed. 1039 (1926).

[4] *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 23 S.Ct. 115, 47 L.Ed. 183 (1902).

[5] *United States* v. *Sandoval*, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913).

[6] *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 19 S.Ct. 722, 43 L.Ed. 1041 (1899).

[7] *Quick Bear* v. *Leupp*, 210 U.S. 50, 28 S.Ct. 690, 52 L.Ed. 950 (1908).

lution of tribal property was affirmed on the basis that while such property was still tribal and not individual, Congress was acting within its plenary power. The Court noted, however, that the plenary power of Congress did not extend to actions carrying the statute into effect and stated that rights created by the agreement could not be divested or impaired, citing *Choate* v. *Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941. This Court said, regarding the power of Congress:

> ". . . It was but an exertion of the administrative control of the government over the *tribal property* of *tribal Indians*, and was subject to change by Congress at any time before it was carried into effect, *and while the tribal relations continued.*" 235 U.S. at 450, 35 S.Ct. at 137, 59 L.Ed. at 312. (Emphasis added.)

This case does not support the assertion that Congress has plenary power over fully assimilated Indians not residing on or near reservations, who own no reservations and the property involved is not tribal in any present sense. Further, the exception noted in *Choate* v. *Trapp*, *supra*, applies since the right of the adult Kansas Delawares to share in the fund was guaranteed to them by the Treaty of 1866 as a condition to their resignation from the tribe.

The Secretary, on page 8 of his Jurisdictional Statement, states the basic premise underlying the whole argument in his Jurisdictional Statement. The Secretary says: "Unlike the Cherokee and Absentee Delawares, who continue to the present day to live on Indian reservations as members of an Indian tribe, the Kansas Delawares are American citizens . . ." (J.S. 8). This statement could mislead this Court into assuming that the basis for the dis-

crimination in favor of Indians approved in the *Mancari* case is present in this case.

The referenced statement is wholly wrong for two reasons: (1) There are no Indian reservations in Oklahoma where most of the Cherokee and Absentee Delawares reside; and (2) The members of the Cherokee Delaware and Absentee Delaware classes are scattered throughout the United States.

In answer to Requests for Admissions in the District Court, the Defendants admitted that the Cherokee Delawares and the Absentee Delawares own no reservations, are not tribal corporations (25 U.S.C. §§477, 503), have no judicial systems or judicial powers, and are scattered over many, probably 25 or more, states. Thus, the statement by the Secretary (J.S. 8), upon which he so heavily relies as a factual premise for his legal argument (based upon *Morton* v. *Mancari*, *supra*), is wholly untrue, as shown by the record, and as we are sure the Secretary, upon examination, would acknowledge.

The Chairman of the Business Committee of the Cherokee Delawares testified before the Congressional subcommittee that the only roll of his "tribe" was the list of persons who shared in the distribution of Docket 337 funds, a list that included Kansas Delawares. Its present "roll" is provided in its Constitution to be those persons eligible to share in the Docket 72 and 298 funds.

There is not a single reference in the evidence to support the statement that members of such classes live on reservations. Neither the statement of facts by the majority opinion nor the dissenting opinion support such a state-

ment and we submit that the jurisdiction of this Court should not be invoked by such a misrepresentation of the status of the favored classes.

The Secretary notes that the distinction between tribal and non-tribal Indians is a crucial distinction which justifies discrimination between the two. That issue is not presented in this case and the statutory discrimination found to exist by the District Court cannot be justified by this non-existent distinction.

Reliance by the Secretary on the other cases cited on page 9 of the Jurisdictional Statement is likewise misplaced since each of such cases involved intra-tribal matters or distribution of *tribal* property.

In the *United States* v. *Jim*, 409 U.S. 80, 93 S.Ct. 261, 34 L.Ed.2d 335 (1972), all of the Indians involved were ward Navajo tribal Indians and the mineral interests involved belonged to the tribe. The distinction between that case and the instant one is obvious. As to the well-recognized legal status and factual attributes of the Navajo tribe, See 25 U.S.C. §§621, *et seq.* and *Davis* v. *Littell*, 398 F.2d 83 (9th Cir. 1968), *cert. den.* 393 U.S. 1018 (1968).

The Secretary then attempts to find the power of Congress to distribute funds in an invidiously discriminatory manner in the wording of Article 8 of the 1854 treaty with the Delaware tribe. Legislative power obviously cannot be expanded by a treaty, nor can the Due Process clause of the Fifth Amendment be annulled by a treaty with an Indian tribe. *Jones* v. *Meehan*, 175 U.S. 1, 20 S.Ct. 1, 44 L.Ed. 49 (1899). (See discussion by the District Court of this con-

tention at J.S. App. 46a.) Further, pursuant to Article 8 of the 1854 treaty, Congress, in the Treaty of 1866, did provide for an application of funds from the sale of said trust lands. In Article 9 of the Treaty of 1866, it was provided that the ancestors of the Kansas Delawares would receive their pro-rata share of such funds! This case involves an attempt to obtain for the Kansas Delawares that pro-rata share.

The Secretary next suggests that the decision of the District Court "calls into question the validity of similar federal legislation and imposes a severe administrative burden upon the Secretary."

Similar Legislation

The District Court did not, as suggested, require, in essence, a *per capita* distribution of the judgment to *all* lineal descendants of members of the tribe at the time of the alleged wrong. The District Court's decision only requires that if Congress is to provide for a distribution on a per capita basis to lineal descendants, it must provide a plan which includes representatives of those who suffered the wrong and cannot arbitrarily and capriciously exclude a class of descendants who have equal standing with those included. This is especially so where the ancestors of the excluded class were, by the Treaty of 1866, guaranteed their pro-rata part of the fund as a condition to their resigning from the tribe.

The Secretary suggests that other past distribution statutes may be illegal because they did not have "catch-all" coverage for all descendants of members of the injured

tribe on the exact date of the wrong, but which statutes did provide for distribution to persons on specified tribal rolls.

In the first place, the District Court did not find the subject legislation to be invalid because it did not provide for "catch-all" coverage. The members of the Kansas Delaware class are descendants from a *specified roll, viz.*, the registry prepared pursuant to Article 9 of the Treaty of 1866 (J.S. App. 9a, 10a). No "catch-all" provision was necessary to include them. Congress need only to have declared ancestral ties to the persons on such specified registry as an additional basis for eligibility, exactly as was done with respect to the Cherokee Delaware and Absentee Delaware fund applicants. 25 U.S.C. §1292(c)(1) and (2).

Secondly, it is not shown that the cited statutes which the Secretary suggests may be illegal exclude descendants of members of the wronged tribe.[8]

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[8] Contrary to the Secretary's suggestion, 25 U.S.C. §788(a)-788(h) (Creeks) has a "catch-all" in the following language:

> ". . . (b) their names or the names of lineal ancestors appear on any of the documents identified herein or on any available census rolls or other records acceptable to the Secretary, which identify the person as a Creek Indian, including ancient documents or records of the United States located in the National Archives, State or county records in the archives of the several States or counties therein or in the courthouses thereof, and other records that would be admissible as evidence in an action to determine Indian lineage."

25 U.S.C. §§1051-1055 (Tillamooks) provides for eligibility based upon a census roll dated January 28, 1898, or an annuity payment roll prepared in 1914. There is no suggestion that these two rolls do not include all persons whose ancestors were members of the tribe at the time of the wrong.

25 U.S.C. (Supp. IV) §§1111-1130 (Miamis) provide for eligibility based upon two 1895 rolls of the Miami Indians, an 1889 roll and, for the Miami Indians of Oklahoma, a roll of the Western Miami Tribe of Indians of 1891. There is no suggestion that these four rolls do not

The suggestion that the decision in this case may "prevent the Congressional practice of distributing a portion of an Indian Claims Commission judgment to the existing tribal governments for common tribal needs" is not correct. The District Court in its opinion made it clear that it was not finding the statute invalid because of provisions for distribution of a portion of the award for common use (J.S. App. 17a, n. 20; 25a, n. 23; and 65a). The statute had no separability clause and the portion of the statute providing for a distribution of 90% of the funds was invidiously discriminatory and void. The District Court said:

> ". . . we cannot confidently say that Congress would have intended the continued operation of the remaining parts of the statute—such as the provision for withholding 10 percent of the awards in trust—if it had known that the statute would have to be subjected to an extension of its distributive provisions to include the Kansas Delawares." (J.S. App. 64a, See also n. 23, page 25a.)

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[8] (Continued)

include all persons whose ancestors were members of the tribe at the time of the wrong.

25 U.S.C. §§1221-1227 (Weas, Piankashaws, Peorias, and Kaskaskias) provide for eligibility based upon the final roll of the Peoria Tribe in 1956, the 1937 census of the Peoria tribe, the 1920 census of the Peoria tribe, the Indian or citizen class lists pursuant to the Treaty of February 23, 1867, or "(e) the Schedule of Persons or Families composing the United Tribes of Weas, Piankashaws, Peorias and Kaskaskias, annexed to the Treaty of May 30, 1854."

Administrative Burden

It is suggested, as a rationale to support the discriminatory legislation, that compliance with the court's judgment would require the development of new tribal rolls rather than the use of existing tribal rolls, whenever an Indian Claims Commission award is to be distributed, asserting that this would place an enormous administrative burden on the Secretary.

This suggestion is a bugaboo.[9] The Kansas Delawares are descendants of persons on a given, recorded roll of 69 ancestors. This roll is in the record. The roll for the pay-

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[9] "Catch-all" provisions are in many distribution acts. See 25 U.S.C. §967(a) which included all Indians "who possess original Omaha blood of the degree of one-fourth or more."

See 25 U.S.C. §601 (Yakima Tribes) which provides eligibility for "all living persons who are of the blood of the fourteen original Yakima Tribes, parties to the treaty of June 9, 1855" and whose ancestors received certain allotments.

See 25 U.S.C. §1011 (Snake or Paiute Indians of Oregon) which provides for eligibility to all descendants of any members of the bands of Indians whose chiefs signed the treaty of December 10, 1868.

See 25 U.S.C. §1101 (Nooksack Tribe) which provided eligibility to "descendants of members of the Nooksack Tribe as it existed in 1855."

See 25 U.S.C. §1131 (Duwamish Tribe) which provided eligibility to "descendants of members of the Duwamish Tribe as it existed in 1855."

See 25 U.S.C. §1151 (Chehalis Tribe) which provided eligibility to "descendants of members of the Upper and Lower Chehalis Tribes as they existed in 1855."

See 25 U.S.C. §1232 (Chemehuevi Tribe) which provides for eligibility to "descendants of members of the Chemehuevi Tribe as it existed in 1860" and "on any other available census roll or other record or evidence acceptable to the Secretary."

In each distribution statute where Indian Claims Commission funds are to be distributed through the tribal entities to members of the tribe, it is necessary to prepare updated rolls under the supervision of the Secretary.

ment of Docket 337 funds (25 U.S.C. §1181) needs only to be opened and updated. There is no administrative burden in so doing which is any different than the use of rolls which form the basis for eligibility in all the distributions of Indian Claims Commission awards on a descendancy basis. "Tribal rolls" are not involved in this action. The reasoning of *Weinberger* v. *Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), is inapplicable because determinations as to whether one has an ancestor on a specified roll (as is required in all per capita distributions where eligibility is tied to a specific roll, *cf.* 25 C.F.R. Part 43j, §43j.6) do not involve subjective questions of motive, intent or state of mind, and one cannot fraudulently "arrange" his own birth (as distinguished from the "sham marriage" issue in *Salfi*).

Assuming, *arguendo*, that there would be an administrative burden involved in the preparation of the roll for distribution, this is no rationale to support the discrimination involved in this action. This Court said, in *Stanley* v. *Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972):

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

CONCLUSION

This case presents the anomalous situation of the United States, having agreed by the Treaty of 1866 that resigning members of the Delaware tribe, as a *condition to such resignation*, were entitled to receive their pro-rata part of what is now an appropriated fund (Art. IX, Treaty of 1866, J.S. App. 113a), now seeking to deny the descendants of such resigning members a pro-rata share of such funds, asserting the rationale in support of such denial to be that *their ancestors resigned from the tribe*. The irrationality of such position is self-evident.

It is respectfully submitted that none of the suggested rationales offered in the Jurisdictional Statement of the Secretary of the Interior present a substantial question for this Court. No issue is taken with the jurisdiction of the District Court nor the standard employed by the District Court in determining whether the subject legislation met the constitutional standards of Due Process.

The opinion of the District Court makes it abundantly clear that the exclusion of the Kansas Delaware class was not only arbitrary and capricious, but, in fact, was not a deliberate exclusion. It resulted from erroneous information given to the Committees considering the legislation (J.S. 34a, 35). The wording of the legislation was adopted to exclude a wholly unrelated group of Indians (Munsees) who separated from the tribe long before the wrongs which were the basis for the award. There was no intent to exclude the Kansas Delaware class and the rationale offered in this action to support such exclusion was never considered by the Congress. *Id.* It is clear that the Committees

considering such legislation believed that all descendants of the tribe at the time of the wrong would be included by the utilization of the two rolls (J.S. App. 66a, 67a). It was expressly represented to such Committees that this would be the case (J.S. App. 67a).

The holding of the District Court that such statute was unconstitutional will now afford Congress an opportunity to accomplish what it intended to accomplish in the first instance. It is submitted, therefore, that the instant appeal should be summarily affirmed on the merits, or dismissed.

Respectfully submitted,

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May, 1976

CERTIFICATE OF SERVICE

I, Delmer L. Stagner, a member of the bar of the United States District Court for the Western District of Oklahoma and a member of the bar of the Supreme Court of the United States, hereby certify that I did, on this ..... day of ....., 1976, serve three true and correct copies of the foregoing upon: Mr. B. J. Rothbaum, Jr., Tomerlin, High & Patton, 323 Fidelity Plaza, Oklahoma City, Oklahoma 73102, counsel of record for the Absentee Delaware Tribe of Western Oklahoma, the Absentee Delaware class and the named individual members thereof; Mr. John G. Ghostbear, 340 Court Arcade Building, Tulsa, Oklahoma 74103, counsel of record for Dorothy Frazier and Ruth Rattler; Mr. Givens L. Adams, Assistant U. S. Attorney, United States Courthouse and Federal Building, Oklahoma City, Oklahoma 73102, counsel of record for Secretary of Interior of the United States; Mr. Bruce Miller Townsend, 201 Denver Building, Seventh and Denver, Tulsa, Oklahoma 74119 (counsel of record for Cherokee Delaware class and named individual members thereof; by placing the same in the United States mail, first class postage thereon fully prepaid; I further certify that I did, on this ..... day of ....., 1976, serve three true and correct copies of the foregoing upon Mr. Henry B. Taliaferro, Jr., Casey, Lane & Mittendorf, 815 Connecticut Avenue N.W., Washington, D.C. 20006, counsel of record for Wanda June Weeks; Messrs. Joseph S. Fontana and John R. Keys, Winston & Strawn, 1730 Pennsylvania Avenue, N.W., Washington, D.C. 20006, counsel of record for Cherokee Delaware class and named individual members thereof; Mr. George C. Christensen, Winston & Strawn, Suite 5000, One First National Plaza, Chicago, Illinois 60603, counsel of record for Cherokee Delaware class and named individual members thereof; and Mr. Duard Barnes, Associate Solicitor, Office of the Solicitor, United States Department of the Interior, Washington, D.C. 20420, counsel of record for the Secretary of

the Interior of the United States, by placing three copies of the same in the United States mail, airmail postage fully prepaid; I further certify that I did, on this ..... day of ....., 1976, in conformity with 80 Stat. 613, 28 U.S.C. §518, serve three true and correct copies of the foregoing upon the Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, by placing the same in the United States mail, airmail postage fully prepaid; I further certify that all parties required to be served have been served.

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Delmer L. Stagner